v. 2850

In the United States Court of Appeals for the Ninth Circuit

No. 14,081

J. A. LESTER, ET AL., APPELLANTS

vs.

LAWRENCE E. PARKER, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

PETITION OF APPELLANTS FOR REHEARING AND SUGGESTION THAT SUCH HEARING BE EN BANC

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Appellants respectfully petition this Court, in accordance with its Rule 23, for a rehearing from the decision rendered August 27, 1956 (per curiam opinion of Circuit Judges McAllister and Pope, with Circuit Judge Healy dissenting) and pray that in view of the major issue of public and national policy involved such rehearing should be *en banc*.

STATEMENT OF FACTS

Since our original brief was submitted in typewritten form pursuant to leave granted by the Court, we briefly restate the facts here for the convenience of the Court in considering this motion.

This is a class action brought by several merchant seamen against local officials of the Coast Guard to enjoin as unconstitutional the enforcement of the merchant seamen screening program administered by the Coast Guard under the Magnuson Act (Act of August 9, 1950, 64 Stat. 427, 50 U.S.C. 191), Executive Order 10173, as amended (15 F.R. 7005, 16 F.R. 7537, 17 F.R. 4607), and regulations promulgated thereunder by the Commandant of the Coast Guard (15 F.R. 9327, as amended, 33 C.F.R. 1955 Pocket Supp., §§ 121.15(e), 121.21(a)).

On the seamen's prior appeal from a final decree, this Court upheld the validity of the Act and indicated no doubt as to the validity of the Executive Order, but ruled that the Coast Guard regulations, issued pursuant to the Executive Order, which set up an administrative hearing procedure denied due process of law "in respect to notice and opportunity to be heard" because they prohibited the disclosure to the seaman of the source of the information against him and the identity of informants and denied any opportunity to cross-examine such informants. This Court directed the issuance of an injunction against enforcement *of the regulations. Parker* v. *Lester,* 227 F. 2d 708, 714, 715, 720, 723-4.

The Coast Guard, in order to comply with this Court's ruling, and as foreseen by this Court (227 F. 2d at 723), issued revised regulations, effective May 1, 1956 (21 F.R. 2814) which changed the provisions of the former regulations with respect to notice to the seamen and denial of opportunity to confront and cross-examine informants. Under the current regulations, seamen such as appellees who were determined

to be security risks under the former regulations invalidated by this Court may apply for security clearance under the new procedure (§§ 121.27, 121.29; 21 F.R. 2817).

Executive Order 10173, as amended, prohibits any seaman from sailing on a merchant vessel unless the Commandant is satisfied that the seaman's character and habits of life are such as to authorize the belief that his presence on board would not be inimical to the security of the United States (17 F.R. 4607).

On remand, the District Court on July 12, 1956, issued a final order and decree which not merely enjoins appellants from enforcing the regulations which this Court held invalid but also requires them to treat appellees, who have never been determined not to be security risks, as entitled to sail on vessels *now,* notwithstanding the flat prohibition of Executive Order 10173.[1] The decree requires appellants to issue to appellees validation endorsements on their Merchant Mariner's Documents just as if appellees had been determined not to be security risks, although in fact no such determination has been made. The decree permits the Coast Guard to initiate proceedings under the new regulations to determine whether or not appellees are security risks, but appellees must be permitted to sail on merchant vessels unless and until it is determined at conclusion of the administrative process that they are security risks.[2]

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[1] Pursuant to this Court's order of July 23, 1956, this appeal was heard on an unprinted record.

[2] The final paragraph of the decree seems to permit the suspension of a seaman's right to sail after he has had a hearing under the new regulations but prior to the Commandant's final determination. But the new regulations make no provision for such a suspension during the pendency of the administrative proceeding.

The Government appealed from the District Court's decree of July 12, 1956, on the ground that those of its provisions which require the Coast Guard to treat appellees as entitled to sail on vessels now, although the Commandant has never found that they are not security risks, are not in accordance with the opinion and mandate of this Court on the prior appeal and in effect invalidate the Executive Order.

This Court's per curiam opinion of August 27, 1956, affirms the decree of the District Court, holding that it is in conformity with this Court's prior decision.

STATUTE AND EXECUTIVE ORDER INVOLVED

The Magnuson Act (Act of August 9, 1950, 64 Stat. 427, 50 U.S.C. 191) provides:

> "Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations—
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> * * * * *
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> "(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States."

Pursuant to this Act, the President issued Executive Order 10173 (October 18, 1950, 15 F.R. 7005) in which he made the statutory finding that the security of the United States is endangered by subversive activity, vested enforcement of the Act in the Coast Guard, and provided:

> "No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States:"
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> * * * * *
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> "The Commandant may require that all licensed officers and certificated men who are employed on other than the exempted designated categories of merchant vessels of the United States be holders of specially validated documents."[3]

REASONS FOR GRANTING THE PETITION FOR REHEARING

The Court's opinion seems to us to rest upon a basic misunderstanding of the operation of the screening program under the Magnuson Act. We agree with the Court that appellees and seamen in similar position who were found to be security risks under regulations of the Coast Guard held to be a denial of due process by this Court's earlier opinion in the case, 227 F. 2d 708, are

[3] As amended by Executive Order 10277 (16 F.R. 7537) and Executive Order 10352 (17 F.R. 4607).

entitled to the same opportunity to work at their chosen trade as seamen who have never been found to be security risks. But the Court's opinion erroneously assumes that a seaman who has not been found to be a security risk is without more entitled to sail on merchant vessels. That assumption is contrary to the provision of the Executive Order that no one may sail on a merchant vessel unless he is affirmatively found by the Commandant not to be a security risk. Concededly, no such finding has been made as to appellees. The Court's holding that appellees are nonetheless entitled to sail now amounts to an invalidation of the Executive Order *sub silentio,* without adequate legal basis, and gives appellees a preferential status over all other seamen.

Appellees, who were found to be security risks under the prior invalid regulations of the Coast Guard, are accorded by the Court's order a right to sail, a right which no other American seaman has under the Magnuson Act and the Executive Order. Accordingly, the Court's order represents (1) an abortion of the national policy embodied in the Magnuson Act and the Executive Order; and (2) preferential discriminatory treatment in favor of these appellees. Although the Court has never indicated any doubt as to the validity of the Magnuson Act and the Executive Order, its opinion in effect nullifies their operation. This is a matter of grave public importance which, we submit, warrants a rehearing.

ARGUMENT

Under the Executive Order and the Coast Guard Regulations No Seaman Is Entitled to Sail on Merchant Vessels until the Commandant Affirmatively Determines that He Is not a Security Risk. The Court's Opinion Erroneously Dispenses With This Requirement as to Appellees.

The basic issue involved in this appeal is whether appellees are entitled to sail on merchant vessels now, or whether the same rule applies to them as applies to all other seamen, i.e., that they may not sail until they satisfy the Commandant that they are not security risks.

We agree that, in the light of this Court's ruling on the first appeal, the Commandant's determinations that appellees are security risks are a legal nullity and that appellees' rights should be decided just as if those security determinations had never been made. We likewise agree with the Court's objective in endeavoring to give appellees equality of treatment with all other seamen in comparable position; i.e., any other seaman whose security status has never been determined. But because the Court misunderstood what the position of seamen who have never had a security determination is, the result of the opinion is to place appellees in a preferential position over all other seamen.

The heart of the Court's opinion and its basic error is the following statement:

> " * * * The only difference between the plaintiffs and those they represent on the one hand, and all the seamen who are currently employed and working on the other, is that the former have been screened off, and denied employment, under the procedures which our decision found to be void and of no effect."

In truth the fact that appellees have been invalidly "screened off" is *not* the only difference between them and all seamen currently sailing. The vital difference between appellees and all seamen working is that the latter have affirmatively satisfied the Commandant that they are not security risks, whereas appellees have not so satisfied the Commandant.

As an illustration, assume the case of a seaman who has just received his Merchant Mariner's Document evidencing his qualifications as an able seaman [4] but who (like appellees) has never obtained security clearance from the Commandant. Is he eligible to sail on merchant vessels? The answer is plainly "no". For both the Executive Order (quoted at page 5 above) and the current regulations of the Coast Guard (§§ 121.01, 121.07, 121.11, 121.21; 21 F.R. 2814-7) prohibit any seaman from sailing unless the Commandant has been satisfied that he is not a security risk, which is evidenced by the placing of a "special validation endorsement" on his Merchant Mariner's Document.

Concededly appellees have not satisfied the Commandant that they are not security risks. Why then should they be entitled to sail now without complying with the requirement of the Executive Order imposed on every other seaman? [5] Surely the Court did not mean to hold that, because appellees have been subjected to a hearing procedure ruled unconstitutional by the Court, they need not comply with requirements of the Executive Order and the current regulations which have not been

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[4] Described in 46 U.S.C. 672 as a "certificate of service as able seaman."

[5] The current regulations permit appellees to apply for security clearance (§ 121.29; 21 F.R. 2817).

ruled invalid.[6] Yet this is precisely the result of the Court's ruling.

Perhaps the Court has been confused by the provisions of the current regulations that seamen who now have special validation endorsements on their Merchant Mariner's Documents would, in the event the Commandant should receive new security information about them, be entitled to continue to sail on vessels during the pendency of any administrative proceeding which might be brought to determine whether they are now security risks (§§ 121.09, 121.11, 121.21; 21 F.R. 2815-7). But seamen who now have special validation endorsements on their Merchant Mariner's Documents are not in the same position as appellees. All such seamen had satisfied the Commandant that they were not security risks in order to obtain their special validation endorsements, whereas appellees have, of course, never satisfied the Commandant that they are not security risks.

The Court's apparent misunderstanding of the way the program operates is further reflected in its statement:

> For the defendants now to insist that plaintiffs remain in this [screened off] status, thus improperly fastened upon them, emphasizes the need for the injunction now issued. Defendants are but trying to give effect to the old regulations by which they denied these men employment by thus undertaking to keep them suspended until defendants get around to hearings under the new regulations.

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[6] In its opinion of August 27, 1956, this Court specifically said: "The question of their [the current regulations'] sufficiency to meet the requirements of due process does not arise upon this appeal."

We do not insist that appellees remain in the status of seamen who have been determined to be security risks. On the contrary, we agree that the Commandant's past security determinations as to appellees should be eliminated in the consideration of their present status. But this merely leaves appellees in the position of seamen whose security status has not been determined one way or another. And under the Executive Order and the current regulations seamen in that undetermined status are not entitled to sail. Far from "trying to give effect to the old regulations . . . " the Government is merely asking that appellees be given the same status under the current regulations as any other seaman whom the Commandant has not yet determined to be entitled to security clearance.

The opinion of the Court enunciates the sound principle that the appellees should be accorded the same treatment as other seamen but, instead of adhering to that standard of equality, the opinion requires the Commandant to accord unequal preferential treatment in favor of the appellees.

The only basis on which the Court could properly conclude that appellees need not comply with the requirement of the Executive Order and the regulations that they obtain security clearance before sailing would be a conclusion by the Court that the provisions of the Executive Order and the current regulations which impose that requirement are either lacking in statutory authority or are unconstitutional. But neither opinion rendered by this Court in this case casts any doubt upon the validity of the Executive Order or the current regulations, and there is, we submit, no sound legal basis for holding them invalid.

Where, as here, questions of national security are involved, the validity of the requirement that seamen whose security status has not yet been determined shall not sail and thus have the opportunity to commit acts endangering the national security during the pendency of the administrative process which determines whether or not they are security risks seems plain. *Bowles* v. *Willingham,* 321 U.S. 503, 519-21; *Yakus* v. *United States,* 321 U.S. 414, 437; *Fahey* v. *Mallonee,* 322 U.S. 245, 253-4; *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594, 599-600; *Central Union Trust Co.* v. *Garvan,* 254 U.S. 554, 566.

Imposing such a precautionary requirement during the pendency of the administrative process is no more a denial of due process than is the exercise by the courts of their authority to issue a restraining order pending trial or appeal of a case.

The Court's opinion, by invalidating *sub silentio* the Executive Order, leaves the national security open to the very risks which the Magnuson Act was enacted to avoid, risks which this Court recognized in its first opinion are within the competence of the legislative and executive branches to evaluate and prevent (227 F. 2d at 718).

CONCLUSION

The Court's opinion is, we submit, based upon a misconstruction of the merchant seamen's security program. It proclaims that the underlying principle of the decree shall be that of equality as between appellees and other seamen and then requires the Commandant to accord unequal discriminatory treatment in favor of appellees. In effect it invalidates Executive Order 10173, as amended, and nullifies the operation of a pro-

gram affecting the national security, in respect to which the Court has not ruled invalid. The petition for rehearing should be granted. Because of the vital national interests involved we request that the case be reheard *en banc*.

Respectfully submitted,

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CERTIFICATE

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and is not interposed for delay.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

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